and road conditions. The skid happened as a result of his own default. The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the plaintiff's case and which weighs against the defendants: see *Noor Mohamed* v. *Palanivelu*;[6] *E.A. Long* v. *Wong Chin Wah*.[7]

Is the second defendant vicariously liable for the first defendant's negligence? To impute him with liability, it must be proved that the first defendant when driving the motor-van at the material time was his agent for the general purposes of the journey. The journey must be undertaken for the second defendant's purposes. It is not necessary to cite authority on the subject but the principle enunciated in *Ormrod* v. *Crosville Motor Services Ltd.*[8] which was adopted by the Federal Court in *Wong It Yong* v. *Lim Gaw Teong* [9] might be referred to. Denning L.J. (as he then was) held the owner's liability firmly on the ground of agency:—

"The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes."

Mr. Vijandran on behalf of the defendants stressed the need to keep the principle in *Ormrod's case, supra,* within its own limit. He submitted that the "owner's purposes" must be personal to him and therefore a brother's wedding does not come within that category. It seems to me that that case does not decide such a far-reaching proposition as that. I think that in the present case it has been pushed too far. In the passage cited above Denning L.J. in his usual way stated the point emphatically and concisely. If the owner has an interest or concern in the purpose for which the vehicle is being driven, that is good evidence of agency. A social or moral obligation will suffice to impute agency: see *Hewitt* v. *Bonvin* [10] *per* du Parcq L.J. at page 196.

The question which is involved in this case raises no new principles of law; it elucidates no new aspects of familiar principles; it is a mere question of the application of the principle in *Ormrod's case* to this particular case. Applying it here there can be no doubt that the first defendant was authorised by the second defendant's father, who had authority to grant it, to drive the motor-van for the purposes in which the second defendant had an interest i.e., to borrow the tarpaulin for the wedding arrangements. He had a moral obligation to see that his brother's wedding is carried through without a hitch. It therefore cannot be said that he had no interest or concern in the journey performed by the first defendant.

I cannot for one moment subscribe to the view as Mr. Vijandran wants me to that the present case is on all fours with the case of *Lee Chong* v. *Tan Kwee Low*.[11] In that case the owner had lent his car to a third party (the second defendant) to be used for purposes in which he had not the slightest interest or concern. It was a case of an outright bailment. The present case is different. The motor-van was there at the owner's house to be used for the purposes of the brother's wedding and the first defendant who is the regular driver of the said van was authorised to drive it. The owner retained possession and the right of control of the motor-van at the material time by the presence in the van of his agent.

I am satisfied that the second defendant is vicariously liable for the negligence of the first defendant.

I will hear arguments as to damages.

Order accordingly.

Solicitors: *Khoo & Sidhu; Athi Nahappan & Co.*

MERCANTILE BANK LTD. v. THE OFFICIAL ASSIGNEE OF THE PROPERTY OF HOW HAN TEH

[O.C.J. (Raja Azlan Shah J.) June 5, 1969]
[Kuala Lumpur — Originating Summons No. 280 of 1967]

Bankruptcy — Deposit of title deeds to secure loan — Failure to pay monies due — Commission of act of bankruptcy — Bankruptcy Act, 1967, s. 47 — Caveats registered against titles — Equitable rights to lien — Application to sell land — National Land Code, 1965 ss. 134, 218(1) and 330.

In this case one How Han Teh deposited documents of title over certain lands with the applicants for the purpose of securing a loan. He failed to repay the loan and judgment was obtained against him. A bankruptcy notice was issued against him but he failed to pay the monies and thus committed an act of bankruptcy. Subsequently the applicants registered caveats against the titles deposited with them as security under the provisions of section 330 of the National Land Code. A petition was subsequently filed against him and receiving and adjudication orders were made against him. The applicants applied to sell the lands by public auction. The application was opposed by the official assignee who claimed that the applicants were not the lien holders on the property as at the time of the act of bankruptcy there was no caveat entered under the National Land Code. The applicants submitted that at the time when the act of bankruptcy was committed the applicants had equitable rights to a lien in contract.

Held: at the time when the act of bankruptcy was committed the applicants had an equitable right to a lien and the trustee in bankruptcy who steps into the bankrupt's shoes, takes a title no better than him. He takes subject to the same equities as affected the property in the bankrupt's hands. The applicants have a prior interest and were entitled to an order for sale.

Cases referred to:—

(1) *Vallipuram Silvaguru* v. *Palaniappa Chetty* [1937] M.L.J. 59.

(2) *Ex parte Hothausen* (1874), L.R. 9 Ch. App. 722 at p. 727.

(3) *Shropshire Union Railway and Canal Co.* v. *The Queen* L.R. 7 H.L. 496, 507.

(4) *Loke Yew* v. *Port Swettenham Rubber Co.* [1913] A.C. 491; Innes 202 S.C.

(5) *Wilkins* v. *Kannamal* [1951] M.L.J. 99.

ORIGINATING SUMMONS.

J. Puthucheary (*Abdullah bin Yusof* with him) for the applicant.

M. Rajendram (Assistant Official Assignee) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application for an order to sell the lands held under E.N.R. 877 lot No. 817 and E.N.R. 1479 lot No. 1535 both in the Mukim of Penjom, in the District of Lipis, state of Pahang, by public auction and other incidental reliefs.

The facts in their chronological events are not disputed. In October 1964 How Han Teh deposited the documents of title over the said land with the applicants for the purpose of securing a loan. He failed to repay the loan and on 28th April, 1966 judgment for the sum of $217,085.71 was entered against him. On 19th May, 1966 a bankruptcy notice was issued against him and that was served on him on 9th June, 1966. On 17th June, 1966 he failed to pay up the monies and thus committed an act of bankruptcy. On 2nd August, 1966 the applicants registered caveats against the titles deposited with them as security under the provisions of section 330 of the National Land Code. A petition was subsequently filed against him on 5th October 1966 and receiving and adjudication orders were made against him on 19th November, 1966. The said How Han Teh died in April 1967, intestate. Since the date of judgment the applicants have received a sum of $30,683.63 to account. The principal sum now due is $186,401.72. The applicants are apparently the only creditors of the said How Han Teh and there are virtually no other assets of the bankrupt other than these lands which are valued at $18,000.

The application is opposed by the Official Assignee in pursuance of section 47 of the Bankruptcy Act, 1957 read with section 281(1) of the National Land Code. Section 47(1) of the Bankruptcy Act provided that the bankruptcy shall relate back to and commence at the time of the act of bankruptcy being committed, upon which the order is made. Section 281(1) of the National Land Code provides that the depositee of the issue document of title shall become entitled to a lien if he had registered a lien-holder's caveat under Chapter 1 of Part Nineteen of the Code.

It is settled law that when the said How Han Teh was adjudged a bankrupt on 19th November, 1966, the Official Assignee stepped into his shoes, and the latter's title relates back to and commences at the time of the act of bankruptcy, that is, on 17th June, 1966. At that time what is the nature of the bankrupt's property? There are the two pieces of land but the Official Assignee claims that the applicants are not the lien-holders on this property as at the time of the act of bankruptcy there is no caveat entered under the National Land Code.

For the applicants it is submitted that at the time when the act of bankruptcy was committed the applicants with whom the issue document of titles were deposited had equitable rights to a lien in contract. He relied on the case of *Vallipuram Sivaguru* v. *Palaniappa Chetty, Official Administrator as Administrator of the Estate of Gan Inn, deceased.*[1] In that case the 1st defendant as depositee of the document of title acquired the first right to present a caveat and so entitled to create a lien under section 134(i) of the Land Code, as against the rights of a subsequent assignee who had lodged a caveat prior to the 1st defendant's. In my view that case is authority for the proposition that although no lien is created under the Land Code until the caveat is registered, the court in the absence of express words in the statute is not preventing "from doing justice between parties by giving effect to equitable rights by way of contract." In other words, although failure to lodge a caveat does not entitle the depositee with whom the issue document of title is deposited, to a lien under the Code, he still possesses a right to it in equity. He can exercise that right by registering the caveat under section 134 at any time. In dealing with such equitable rights the courts in general act upon the principles which are applicable to equitable interests in land which are not subject to the statutes. In the case of two conflicting equities, the first in time prevails, all other things being equal.

Now, section 218(1) of the National Land Code is virtually identical to section 134(i) of the Land Code, i.e. registration of the caveat is still an essential ingredient for a valid statutory lien and unless there are express words in the Act, this court is not precluded from giving effect to equitable rights existing between the parties. It therefore follows that at the time when the act of bankruptcy was committed the applicants had an equitable right to a lien and the trustee in bankruptcy who steps into the bankrupt's shoes, takes a title no better than

him. He takes subject to the same equities as affected the property in the bankrupt's hands. In *Ex parte Hothausen* (2) a trustee was ordered to sell a house the title deeds of which had been deposited with a creditor by the bankrupt and to pay the proceeds to the creditor. In this case S & Co. merchants in London and Shanghai deposited title deeds to a house in Shanghai for opening a credit of £5,000. No conveyances or memorandum of deposit were made at the British Consulate at Shanghai. In Prussian law the contract was binding personally on S & Co. but as the necessary formalities for perfecting the security had not been gone through the appellant had no mortgage or lien on the house. James L.J. on page 727 observed:—

". . . . and I myself do not believe that there is any law in any civilised country in the world which says that any party to such a contract properly evidenced is not bound by it. If that is so, the debtors were personally bound by the contract at the moment when their liquidation commenced. They ought to have fulfiled it; and that a bill could have been filed against them in this country to have compelled them to fulfil that contract is beyond all question. In this country, in an English bankruptcy the trustee stands exactly in the same position as the bankrupt himself stands in and therefore his trustee is bound to perform the contract in exactly the same way as he himself was bound to perform it."

and Mellish L.J. concurred with this view (p. 727) and added:—

". . . . and if it is personally binding then this court exercising the English Law of bankruptcy where the bankruptcy takes place will say that that which is personally binding upon the debtor is also binding upon his trustee."

I therefore take the view that there must be an order in terms of the summons. It has not been shown that there are express words in the statutes which preclude me from enforcing the equitable rights of the applicants. Under the bankruptcy law the trustee in bankruptcy is a statutory assignee who takes the bankrupt's property subject to the equities and liabilities which affect it in the bankrupt's hands at the time the bankruptcy was committed. See *Halsbury's* 3rd Edition Vol. 2 at p. 421 para. 838; *Das* "The Torrens System in Malaya" at page 192.

Therefore, *prima facie* the applicants who are prior in time must succeed unless it can be shown that he had relied on something tangible and distinct having grave and strong effect to accomplish the purpose: see *Shropshire Union Railway and Canal Co.* v. *The Queen.* (3) In the present case the substantial complaint against the applicants is that they had failed to register the caveat before the act of bankruptcy was committed. That, as has been perceptively said in the *Shropshire Union* case is not conduct of a character "which would operate and enure to forfeit and take away the pre-existing equitable title." The applicants had not parted with the documents of title. They retained possession of them all the time and it is open to them to register the caveat at any time. In my judgment, they had done nothing to forfeit their priority.

The Official Assignee's view is not correct, *Vallipuram's* case is against him. He forgets that independent of our land legislation our courts have always recognised equitable and contractual interests in land. See *Loke Yew* v. *Port Swettenham Rubber Co.* (4) See also section 206(3) of the National Land Code. The registration of the caveat does not confer priority nor does it create new right. It temporarily protects such rights in anticipation of legal proceedings. Taylor J. in *Wilkins* v. *Kannamal* (5) said:—

"The Torrens law is a system of conveyancing; it does now abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its special objects."

See also *Das* "The Torrens System of Malaya" at pages 189-190, 196, 303.

I will hear arguments as to costs.

Application allowed.

Solicitors: *Skrine & Co.*

RE TAN TYE DECD.; BRITISH & MALAYAN TRUSTEES LTD. v. ESTATE & TRUST AGENCIES (1927) LTD.

[O.C.J. (Choor Singh J.) June 6, 1969]

[Singapore — Suit No. 2044 of 1964]

Trust and Trustees — Loss to estate — Alleged wilful neglect or breach of trust — Property subject to lease — Buildings on property belonging to tenant or sub-tenants — Apportionment of rent of land and buildings — Abandonment of counterclaim — Whether loss caused by defendants.

Landlord and Tenant — Property subject to lease — Expiry of lease — Lessee liable to pay profits — Mesne profits claimable when claiming for recovery of possession — Control of Rent Ordinance (Cap. 242), s. 15(1)(g).

In this case the plaintiffs, the present trustees of the estate of Tan Tye deceased, claimed a declaration that the defendants, who were the former trustees, were liable to make good to the estate the loss suffered by the estate by reason of the wilful neglect or breach of trust on the part of the defendants. The property subject to the trust was land used as the Happy World Amusement Park. This had been leased for a term of years expiring on the May 31, 1957. Under the lease the rent was to be at an increasing rate rising up to $800 a month. Under the term of the lease the tenant was permitted to erect buildings. The tenant erected on the land or caused to be erected buildings thereon by sub-tenants. In 1955 the lessee instituted proceedings against the defendants, as trustees of the estate, for a declaration that the lands and buildings